IN THE

Supreme Court of the United States.

October Term, 1920
No. 402

DETROIT UNITED RAILWAY,
Appellant,

vs.

CITY OF DETROIT, et al,
Appellees.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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No. 492.

DETROIT UNITED RAILWAY,
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Appellees.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The Detroit United Railway, the appellant, by its bill of complaint presented a case arising under the Constitution of the United States, (Transcript, pp. 20, 21). The District Court held that it had jurisdiction and decided the constitutional question against the contention of the appellant (Opinion, Transcript, pp. 57-60; Decree, pp. 66, 67). This appeal has been taken and the appellee, City of Detroit, now moves to dismiss or affirm.

FIRST: The motion to dismiss should not be granted.

To grant this motion would be to hold that *this* Court has no jurisdiction. This would be to leave the decree of the District Court in full force and effect. The District Court, not only in its opinion, but by the decree itself, held that a question was presented under the Fourteenth Amendment of the Constitution of the United States (Transcript, p. 66). Thus holding, the District Court determined the constitutional question in favor of the appellee. To dismiss the appeal would be to deprive the appellant of the right to review this determination. But that right of review has been expressly granted (Judicial Code, Sec. 238). The appellee cannot obtain a decree denying the constitutional right and preclude the consideration of the question by this Court.

SECOND: The motion to affirm is without merit.

(1) *It is manifest that the motion to affirm cannot be granted in the view that the District Court was without jurisdiction.*

The District Court decided that it had jurisdiction and the decree so determined. To affirm the decree would be to affirm this determination. It would be to leave the decree standing as an adjudication that the Court had jurisdiction and as an adjudication, in that view, upon the merits. It would be to affirm a decree not only passing upon the merits of the bill, but giving to the de-

fendants affirmative relief by an affirmative adjudication with respect to the appellant's rights (Transcript, p. 66). If it could be deemed that the District Court was without jurisdiction, the remedy would be not to affirm, but to reverse the decree and direct the dismissal of the bill upon the ground of lack of jurisdiction.

But, plainly, the District Court did have jurisdiction, the allegations of the bill, as the District Court found, being adequate to raise the constitutional question.

Home Telegraph & Telephone Co. v. *Los Angeles*, 227 U. S. 278, 287, 288.

Cuyahoga Power Co. v. *Akron*, 240 U. S. 462.

Denver v. *Denver Union Water Co.*, 246 U. S. 178.

Cincinnati v. *Cincinnati & Hamilton Traction Co.*, 245 U. S. 446.

Detroit United Railway v. *Detroit*, 248 U. S. 429.

(2) *Nor can it be said that the motion to affirm should be granted in the view that the case presented is so clearly without merit that no further argument is required.*

On the contrary, we submit that an examination of the record will show not only that the appellant should be heard in ordinary course, but that the appellant has made a case entitling it to constitutional protection and that the decision of the District Court was erroneous.

It is at once apparent that, as the Court below had jurisdiction, all questions were before it, lo-

cal as well as Federal (*Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 303). The District Court passed upon both questions (Transcript, p. 67). It would be difficult to suggest a more serious question than the validity of the submission to the voters of the City of Detroit of the ordinance involved, as the Court cannot fail to see that that submission was made by the City authorities, in the exercise of the power conferred upon them by the State, in a misleading and deceptive manner by misrepresenting to the electors the effect of their vote in favor of the ordinance. The appellee makes no satisfactory answer to the allegations of misrepresentation in fact, but, in substance, defends upon the ground that such official misrepresentations, having had their effect, cannot be considered in attacking the validity of the submission. This question has never been decided by this Court and there is no decisive authority, of which we know, in opposition to our contention. That contention involves the most fundamental principle of fairness in official action in conducting a *referendum*. Certainly, if it were ever to be held that, through the action of the officers entrusted with the duty of submission, electors could be misled as to the effect of their vote and that there was no remedy to those whose rights were thus jeopardized, it would be a conclusion only to be reached after full argument and the most deliberate consideration. We apprehend that such a conclusion never will be reached. The more important the *referendum*, the more important that the submission be made in a proper manner.

Then, armed with the authority claimed to exist by virtue of the popular vote thus obtained, the

effort has been made to invade the rights of the appellant, to deprive the appellant of its property, not by due process, but by illegal action, by an abuse of process. It is like the case described in *Home Telegraph & Telephone Co.* v. *Los Angeles, supra,* where those in possession of State power used that power "to the doing of the wrongs" which the Constitution forbids. Unquestionably, the rights of a municipality are to be jealously safe-guarded, and, equally, the rights of private property, and of those who have made their investment in public utilities, are not to be overthrown. There is, of course, a just balance, but that balance, as we conceive it, is not to be maintained if such an assault and perversion of State power as is presented in this case is to be permitted without redress.

Two questions are presented, (a) as to the rights of the appellant, and (b) as to the course taken by the City.

(a) *The rights of the appellant.*

The appellee insists that as to portions of the Fort Street line and Woodward Avenue line, embraced within the City's plan, the appellant's franchises have expired. Reliance is placed upon the decree (with respect to portions of the Fort Street line) entered February 28, 1913, and affirmed by this Court (see *Detroit* v. *Detroit United Railway,* 229 U. S. 39; Transcript, p. 5, Ex. 4, p. 42).

But it is alleged in the bill of complaint, and admitted by the motion to dismiss, that the appellee did not see fit to enforce the decree in the Fort Street case or to require the appellant

to cease its operation in those streets in which franchises had expired, but acquiesced in the continued operation of these lines. Thus, a new situation was created after the decree in the Fort Street suit.

The City recognized that the continued operation of these lines by the appellant was absolutely essential to the public interest. The industrial life of the great city of Detroit was absolutely dependent upon this continued operation. At that time the City had no power to construct municipal lines and to compel the appellant to cease operation would be simply to end transportation and throttle the City's business. Short of famine or pestilence, no greater calamity could be imagined than to destroy the circulatory system of the City. It was all very well for the City to obtain its decree in 1913, but it was a very different thing for the City to compel the appellant to discontinue operation and hence it pursued another and what it evidently thought to be not only a better but a necessary course.

Manifestly the City could not blow hot and cold. Appellee seems to forget that in such matters there are reciprocal rights and interests. When the City obtained its decree that the appellant was without rights in the streets where the franchises had expired, and should be required within a time to be fixed to remove its property from the streets, this determination necessarily involved that the appellant was under no further obligation to continue its service. If the City could require the removal of its tracks, the appellant had the right to remove them. As was said in *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 190, if the condition were such as to leave

"the company actually without the right to maintain its plant in the City thereafter", then "necessarily this would leave it at liberty to discontinue the service at will". In these circumstances the appellant elected to continue the service as a public undertaking and the City chose to permit, indeed to require, its continuance. This, however, could not happen without giving rise to new rights and obligations, as this Court has definitely decided to be the result in such cases.

The facts are not in dispute, being alleged in the bill and being admitted by the motion to dismiss. That the appellant's railway system is substantially the only means for transporting large portions of the employees in the industries within the City between their homes and places of employment, that the street railway system is a single unit, and that the separation of the lines and parts of lines here involved "would paralyze the industrial and business life of said City, throw thousands of its residents out of employment, and shut down its industrial plants and factories" is conceded (Transcript, p. 5). It was in this view that the City required continued operation of the lines in question.

Some of the more important facts detailed in the bill of complaint may be briefly summarized. Since the expiration of the franchises on the Fort Street lines, there has necessarily been expended by the appellant, with the approval of the City, for the proper operation of t he Fort Street lines and the construction of additions and betterments, about $1,500,000, of which nearly $900,000 was expended on the lines involved in the decree of February, 1913, and by far the larger part of this amount was expended since that decree (Transcript, p. 6). Large amounts have been expended,

in similar circumstances, on the Woodward Avenue line since the alleged expiration of franchises (*id.*, pp. 6, 7). It appears that approximately $2,800,000 has been expended, with the approval of the City, upon lines as to which it is claimed franchises had expired in order to secure continued operation for the benefit of the people of the City (*id.*, p. 8).

In August, 1918, the so-called Kronk Ordinance was passed by the Common Council of the City (*id.*, p. 6; Ex. 4-B, *id.*, p. 47). This prescribed rates of fare for the appellant's entire City system, including both franchise lines and those on which the previous term franchises had expired. This ordinance was before this Court in *Detroit United Railway* v. *Detroit*, 248 U. S. 429. In that case the District Court had taken the view that "the power to compel the company to remove its tracks from the lines involving the non-franchise roads included the right to fix terms of continued operation upon such lines, whether remunerative or not". That view was held by this Court to be wrong. It was held that the case was ruled in principle by the *Denver* case. The Court said that instead of compelling the Company to cease its service and remove its tracks from the non-franchise lines within the City, the City had enacted an ordinance "for the continued operation of the company's system, with fares and transfers for continuous trips over lines composing the system whether the same had a franchise or not", and that this action "contemplated the further operation of the system, and fixed penalties for violations of the ordinance" (*id.*, p. 435). The Court further said:

> "It is clear that the city might have taken a different course by requiring the company to take its tracks from the non-franchise lines; it elected to require continued maintenance of the public service, doubtless because it was believed that it was necessary in the existing conditions in the city to continue for a time at least the right of the Railway Company to operate its lines. *This amounted to a grant to the company for further operation of the system, during the life of the ordinance*". Italics ours. (*Id.*, 436.)

Not only did this ordinance recognize the right and the duty of the appellant to continue its service, but in June, 1919, the City began a suit against the appellant in the State Court to compel it to operate certain lines where a strike had intervened. The Court decreed, at the City's instance, that the appellant should operate its entire system for a period specified and at a rate of fare prescribed and the City Council approved the arrangement (Transcript, p. 6, Ex. 4C, 4D, 4E; *id.*, pp. 48-51).

It is then idle to contend that the City is in a position arbitrarily at its will to compel the appellant to discontinue its service upon its lines, whether or not the lines were those on which franchises had expired prior to these arrangements.

Suppose the appellant undertook to discontinue any of these lines, what would the City say? Would it not immediately be contended that the Appellant had entered into an undertaking to serve the public and must comply with its undertaking? And if there is such an obligation there must be a correlative right. Such matters are of the gravest consequence. This is undoubtedly an important case to all the parties concerned, but the principle involved is of transcendent import-

ance, not only to public service corporations but to the communities they serve, for fundamentally the question is whether such communities may be deprived of service at will.

In the *Denver* case (246 U. S., p. 190), the Court found itself unable to conclude that the Water Company could discontinue its service at will, or that in such a view the City Council could arbitrarily compel it to discontinue its service, and said:

> "The alternative, which we adopt, is to construe the ordinance" (that is, the ordinance regulating rates after the expiration of the franchise) "as the grant of a new franchise of indefinite duration, terminable either by the City or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver. It recognizes the dependence of the City upon this plant, by necessary implication confers upon the company whatever privileges may be necessary to enable it to continue serving the public, in effect requires it to furnish water, and in terms prohibits it from exceeding the specified rates".

This is the principle which this Court said was applicable in Detroit in view of the municipal action taken since the expiration of the franchises (248 U. S., p. 435). That is, reciprocal rights and duties have been created. What then is the period during which such rights and duties are to continue? Is not the very foundation of the decision as to the existence of these reciprocal rights and duties such as to preclude the view that they are to continue simply at arbitrary will? The term may be indefinite, but it is measured by proper regard for the public interest. The undertaking of the appellant is to serve while that service is

required in the public interest, and the grant and requirement of the City which spring, as this Court said, by "necessary implication" from the admitted circumstances, have a similar duration. Thus neither is remediless when arbitrary action is attempted. This Court said that the grant was "terminable either by the City or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver" (246 U. S., p. 190).

The City of Detroit now claims that it has received authority to construct municipal lines. No one asserts that the City had any such authority prior to the special election of April, 1920. During the period prior to that election, it was admittedly impossible for the service to be discontinued with any regard for the public interest. If any new situation has been created, it is due solely to the special election of April, 1920, that is, to the submission and alleged adoption of the ordinance, the validity of which is challenged in this suit.

Moreover, not only was the operation of the lines in question continued after the alleged expiration of the franchises in such circumstances as to import an undertaking and a grant, as above stated, but with the approval, and virtually under the requirement, of the City in order to maintain the service, large amounts of money have been appropriately expended by the appellant upon certain of these lines. The appellant has a manifest equity that its continued operations should not be impaired or destroyed without proper reimbursement for these outlays made on the faith of the continued right to conduct the service. There is no principle which permits a municipality to escape such an equitable obligation (see *Essex* v. *New England Telegraph Co.*, 239 U. S. 313, 321).

And, in view of what has taken place since the decree of 1913, due process requires a hearing and judicial determination before the appellant can be put off the streets (see *Ramsdell* v. *Maxwell*, 32 Mich. 285).

It is enough for the present purpose, so far as this motion to affirm is concerned, to show the seriousness of these views, but it is easy to go further and expose the fallacy of the opposing contentions.

I. Thus it is said that there is a complete answer in the fact that the Michigan constitutional prohibition adopted in 1908 provides that there shall be no grant of a public utility franchise which is not subject to revocation at the will of the City unless such proposal shall have first received the affirmative vote of three-fifths of the electors. But there was a similar situation in the *Denver* case. For the constitution of Colorado (as amended in 1902) empowered the City of Denver to construct, purchase and operate water works and provided that "no franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors" (Article XX, Secs. 1, 4; see *Denver* v. *New York Trust Co.*, 229 U. S. 123, 129). But this constitutional provision has no application to a grant by necessary implication for the protection of the public interest such as that found to exist in *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 190. Such a franchise is not within the intendment of the prohibition. It is an indeterminate grant to protect the public and carries with it the duty of service, both being terminable

"at such time and under such circumstances as may be consistent with the duty" that the company and the City owe to the inhabitants.

II. Again, it is said that in ordinances and resolutions it has been provided that each party should reserve all its rights. But what are these rights? The same argument applied in the *Denver* case, for there the ordinance regulating rates after the franchise had expired, as the dissenting opinion pointed out, set forth that the Water Company was "without a franchise and a mere tenant by sufferance of the streets of the city and county of Denver" and it was said that the ordinance was passed "without in any manner recognizing said The Denver Union Water Company's right to occupy the streets of the city and county of Denver, or to continue its service as a water carrier, but for the purpose of regulating and reducing the charges made by it", etc. (246 U. S., pp. 195, 196). But despite this language, the Court construed the action taken by the City as necessarily implying a grant. The Court called attention to these recitals, but said that "the enacting provisions, in the terms employed and by necessary intendment, are inconsistent with these declarations, and must be taken to override them" (*id.*, p. 189). And the same conclusion was reached, despite such recitals, in the case of this appellant in *Detroit United Railway* v. *Detroit* (248 U. S., p. 435).

III. Again, it is argued by the appellee that there can be no estoppel "where both sides have equal knowledge of the lack of power". But there was no lack of power, and that in such circumstances the City may be held to its fair obliga-

tion, whether it is deemed to be based upon grant or upon estoppel, is quite clear (see *Essex* v. *New England Telegraph Co.*, 239 U. S. 313, 321; Dillon on Municipal Corporations, 5th Ed., Vol. 3, Sec. 1194).

It cannot be gainsaid that the appellant was entitled to constitutional protection against improper interference in the exercise of its rights. This was the point of both the *Denver* and the *Detroit* cases above cited, for in each there was a constitutional right to protection against confiscation, although the City insisted that it could do as it pleased because the franchises had expired. The Court held to the contrary, as the Company was rendering under an implied grant a proper service and any action regulating its service had to be consistent with constitutional limitations. So here, the appellant is constitutionally entitled within the sphere of its lawful operations to be free from molestation and coercion through the wrongful use of State power by the City authorities.

(b) *The action taken by the City.*

As has been said, prior to the special election of April, 1920, when the ordinance in question was submitted, the City was powerless to engage in the enterprise itself. Upon the admitted facts, the City could not arbitrarily disrupt the service. The appellant was within its rights until a situation arose in which the essential service to the inhabitants could be safeguarded by some municipal plan. The question arises whether such a situation has developed and this, so far as this aspect of the question is concerned (and apart from the duty of the City to make equitable reim-

bursement for the outlays above mentioned made by reason of the City's insistence) involves the question of the validity of the submission at the special election in April, 1920, of the proposal for the construction of municipal lines. The City now insists that, by virtue of that submission, an ordinance has been adopted by which it has power to construct municipal lines and hence to compel the appellant to discontinue its service upon the lines embraced in the ordinance. In this view the City claims to be possessed of the power to put the appellant off the streets with respect to essential parts of the appellant's system and to threaten the appellant with this ejectment unless it will sell its property for an inadequate compensation (Transcript, pp. 20, 21).

The applicable principle with respect to the protection accorded by the Fourteenth Amendment was thus stated in *Home Telegraph & Telephone Co .v. Los Angeles*, 227 U. S. 278, 287:

> **"Here again the settled construction of the Amendment is that it pre-supposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial pow-**

er is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

If the submission was illegal, if it was deceptive and misleading and the ordinance was not validly adopted, then the proceeding of the City in its interference with the appellant, and its attempt to coerce it to part with its lines, is simply the use of State power for the prohibited purposes and an invasion of the appellant's rights without due process of law. The question necessarily arises, in what manner did the City acquire its asserted power? How was this ordinance submitted to the voters? What is the necessary conclusion as to the validity of the submission?

There is no controversy as to the controlling facts. The Constitution of the State of Michigan, as revised in 1908, provides (Article 8, Sec. 25) that no city shall acquire any public utility unless the proposition shall have first received the affirmative vote of three-fifths of the electors of the city voting thereon at a regular or special municipal election.

The Home Rule Act of Michigan, enacted in 1915 (Section 4, subdivisions (i), (j) and (k), 1 Comp. Laws Mich. 1915, Sec. 3307) gave each city authority to provide in its charter for the acquisition of public utilities, the procedure being, of course, subject to the constitutional requirement. The present charter of the City of Detroit, adopted in 1918, in the chapter relating to municipal ownership and operation of a street railway system contains the following provisions (Chapter XIII, Sections 6, 7, 8; Transcript, p. 18):

> "Sec. 6. It shall be the duty of said board to proceed promptly to purchase, acquire or construct and to own and operate a system of

street railways in and for the city, and as soon as practicable to make said system exclusive. Said board shall, whenever it deems it necessary, build extensions and new lines. Such extensions and new lines shall be first approved by the common council.

"Sec. 7. Said board may purchase or lease, or by appropriate proceedings prescribed by law and in the name of the city condemn all or any part of the existing street railway property in the city, and in like manner said board shall have power to acquire a street railway property without the limits of the city as prescribed by law, if the board shall determine; or it may make the necessary purchases of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate, and said board shall construct, own, maintain and operate in said city for said city and within a distance of ten miles from any portion of its limits as aforesaid, a system of street railways beneath, upon and above such streets and other places in the city and outside thereof as aforesaid as the common council shall from time to time elect.

"Sec. 8. Any contract to purchase or lease herein contemplated, or any plan to condemn existing street railway property shall be void unless approved by three-fifths of the electors voting thereon at any regular or special election, and upon such proposition women tax payers having the qualifications of male electors shall be entitled to vote."

It is apparent that the City obtains no authority to purchase, lease or condemn existing street railway property unless three-fifths of the electors approve the contract to purchase or lease or the plan to condemn, at a regular or special election. In the present case it is admitted, and the Court

below has held, that the ordinance in question did not empower the City to purchase, lease or condemn any portion of the railway property of the appellant, as no contract to purchase or lease or plan to condemn has been submitted to the voters (Transcript, p. 67).

The question, then, is with respect to the submission of the proposition by the City to construct trackage on streets where there is existing trackage belonging to the appellant.

It is at once perfectly plain that such construction would in any event cause considerable inconvenience, and it would be remarkable if the citizens were willing, without any plan for purchase, lease or condemnation being submitted, to authorize the tearing up of existing tracks and the construction in their place of municipal trackage. Such a proposition is on its face insensible.

Then, we find that the submission took an ambiguous, misleading and deceptive form, so as to lead the electors to suppose that the construction would be only where there were *no* existing lines and that there would be a purchase where there *were* existing lines. This was the character of the submission, although no plan for purchase or condemnation was properly submitted.

The answering argument, in substance, is that the Court cannot deal with the manner of the submission, no matter how misleading or deceptive it was, but that the Court is bound simply to take the face of the ordinance and to indulge the conclusive presumption that the voters gave their approval with a full understanding of its purport.

Fortunately, there is no such absurd and artificial rule of law. The City authorities were not acting outside their power in formulating the submission. To have a valid submission it was nec-

essary that they should act validly within their power. The position taken by the District Court that the motives of electors and legislators cannot be inquired into is beside the point and its statement that the acts complained of were "unofficial acts" is, we submit, erroneous and shows an entire misconception of the case.

This is apparent from the fact that prior to this special election and by the amendment of the Charter of the City of Detroit, adopted April 7, 1919 (Title III, Chapter I, Sec. 13), the administrative powers and duties of the Common Council of the City were defined so as to embrace the following:

> "(e) To submit to the electors of the City of Detroit at any election, general or special, propositions by law required or permitted to be submitted to said electors, bonds by law required or permitted to be submitted to said electors, questions or matters by law required or permitted to be submitted to said electors, and all propositions, questions or matters upon which said Common Council desires the vote of said electors."

The Common Council thus had the authority to submit the proposition to the electors, and the most elementary principle requires that the Common Council in exercising this authority should make the submission fairly and in a manner not calculated to mislead and deceive the voters.

In thus providing for the submission, it was also plainly within the power of the Common Council to give to the electors convenient sample ballots with information as to the purport of the submission. To say that the Common Council may submit to the electors propositions and not do those ordinary and appropriate things which go with

the submission in order to make it intelligible, would be, as it seems to us, a most extraordinary and unwarranted ruling. It is alleged in the bill of complaint that the City and Mayor and Common Council caused to be prepared and distributed to the voters some weeks prior to the election of April 5, 1920, what purported to be a sample ballot and setting forth the proposed plan (Transcript, pp. 12, 13; see Ex. 6, sample ballot opposite p. 52). This was designated on its face as "Official Information". It was issued officially by the Common Council under its authority to make the submission.

This "official information" set forth what was called the "official plan for 'A' & 'B' Lines", as follows:

"FINANCIAL PLAN FOR 'A' AND 'B' LINES.

Present trackage to be taken over at cost less depreciation as specified at the time company was given permission by city to build under a Day-to-Day agreement:

34.25 miles estimated at $40,000	$1,370,000.00
Fort and Woodward tracks where franchise has expired 21.25 miles estimated at $40,000	850,000.00
New tracks in unserved districts, 100.75 miles estimated at $70,000	7,052,500.00
400 new electric motor cars estimated at $10,000 each	4,000,000.00
150 new trailers estimated at $5,000 each	750,000.00
(If the Ford gas car is used, the cost of cars will be reduced about 50 per cent.)	
Car Barns, tools, etc.	1,000,000.00
Total	$15,022,500.00

This $15,000,000.00 bond issue is for 30 years and will be paid by yearly installments through that period.

The Class 'C' lines, consisting of 62 miles, will be developed as soon as 'A' and 'B' are in operation.

The $15,000,000.00 bond issue covers the building, equipping and where it is proposed, the taking over, of a total of 156 miles of the complete system of 218 miles."

The statement was accompanied by a diagram showing the various lines to which reference is made. It was thus stated in so many words that the *"present trackage"* was to be *"taken over"* at cost less depreciation. The amount to be paid for the present trackage thus to be taken over was specified. The same purpose as to taking over is indicated as to the "Fort and Woodward tracks". There was no statement that there was to be any construction where there was existing trackage. It was not stated that there was to be construction if purchase or taking over failed. Where there was *no* existing trackage, the reference was to the "new tracks" in unserved districts. It was perfectly clear that any voter would be entitled to assume from this official information that the existing trackage was to be taken over and to this extent the lines were not to be constructed.

This view followed what the Mayor had said in his message proposing the ordinance as it appeared in the Official Bulletin of the proceedings of the Common Council on January 6, 1920, where the Mayor said:

"The Class A system provides the taking over of 34.25 miles of lines built under the so-called 'day-to-day' agreement, in which the

> city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about $40,000 per mile. Added to this, we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, *which, it is safe to assume, the railway will be glad to deliver us in preference to getting off the street, at say, an estimated cost of $40,000 per mile*" (Italics ours; Transcript, p. 12; Ex. 5, p. 32).

It is without avail for it to be said, as is stated in the Mayor's affidavit which the appellee undertakes to submit, that certain lawyers said, in the course of the campaign, that the submission was not valid for the purpose of a purchase. For the point is that the official information given to the voters by the Common Council in connection with the submission, and upon which they were entitled to rely, was that the plan which they were asked to approve involved no construction where there was existing trackage, but that in such case it was the purpose to take over the existing lines on terms advantageous to the City. The ordinance itself was ambiguous in its language, for it spoke of authority "to acquire, own, maintain and operate" (Transcript, Ex. 3, p. 27).

Thus, while it is now admitted (see Appellee's Brief on this Motion, p. 9), that the ordinance "did not in any manner authorize the acquisition of plaintiff's property in said streets" (Fort Street and Woodward Avenue), for the reason that the charter required the submission of a definite contract to purchase or to lease, or of a plan to condemn, and that the submission in question was not adequate for this purpose, still it was officially

represented to the voters that the proposition for construction was for the purpose of building lines where there was *so* existing trackage and that it was the plan to purchase and take over the lines, on advantageous terms, where there *was* existing trackage. The amount of the bond issue, as the official information showed, was computed upon this basis. If this was not a misleading and deceptive submission, we do not know what would be properly so described.

The City did not arm itself in a proper manner with power to construct. Its authorities abused the State power confided to them through an improper submission, and, on the basis of the authority thus claimed to have been obtained through the vote of the electorate, it is now sought to coerce the appellant into parting with its lines at an inadequate compensation.

The City, in effect, says to the appellant, "We will put you off the streets because now we have power to construct and are entitled to construct in the public interest. You will have no day in court, you must get off the streets when we demand it. If you do not like this course we will take your property for such sum as we are willing to pay. Agree to our terms or your property will be destroyed".

It thus becomes obviously necessary to inquire, Is this a proper action by the City in the exercise of State power conferred upon it? Is this due process of law or is it a proceeding without warrant in due process, through a wrongful exercise of State power, to subvert the rights of the appellant?

When the appellant went on with its service, as it was essential to the interests of the City that

it should go on, and the City acquiesced in its course and in truth required the appellant to continue to render the service, the appellant obtained the right to continue, and became entitled to protection in its operations, until by a lawful exercise of State authority, and by the doing of manifest equity in appropriate reimbursement, the City would be entitled to supply the necessary service by some municipal plan. The State had conferred upon the City authority to purchase and acquire municipal lines, but had imposed conditions that the consent of the electorate should be obtained in the manner specified. Instead of obtaining the consent of the electorate in a proper manner, the City authorities abused this State power to make a misleading and deceptive submission and obtain an apparent consent of the electorate influenced by inaccurate and misleading official information in the course of the submission.

To permit the City to proceed, on the assumption of a power thus acquired, to coerce the appellant and to drive it off the streets unless it will consent to part with its lines at an inadequate price, would be suffer the appellant to be deprived of its property without due process of law. It would constitute an abuse of the power conferred by the State just as clearly as an attempt to impose confiscatory rates. It would be a case, within the principle announced by this Court, "where the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrong-doer". The State power here lodged with the City authorities was to obtain consent from the electorate for the purpose of construction. That State power was abused and an apparent consent was wrongfully obtained. And, then,

through this pretended exercise of State power the appellant is placed under duress and the destruction of its property is threatened.

We submit that the case calls for the granting of the protection accorded by the provisions of the Constitution of the United States and that the appellee's motion should be denied.

Respectfully submitted,

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Of Counsel for Appellant.